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Via E-Mail & U.S. Mail

Rachel Tennis, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

Re: Comments on the California State Lands Commission's June 5, 2013 Letter to U.S. EPA Requesting Removal of the State Lands Commission as a PRP at the Yosemite Slough Site

Dear Ms. Tennis:

This letter provides comments in response to the letter dated June 5, 2013 from Deputy Attorney General David G. Alderson, on behalf of the California State Lands Commission (the "SLC" or the "Commission"), to Thanne Cox ("the SLC Letter") in which the SLC requested that the U.S. Environmental Protection Agency ("EPA") remove it as a potentially responsible party ("PRP") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") at the Yosemite Slough Superfund Site ("Yosemite Slough" or the "Site"). The SLC was named as a PRP at the Site based on its status as an owner of a portion of the Site. EPA's April 5, 2013 General Notice of Potential Liability to the SLC (the "GNL") stated that "EPA believes that [the SLC] may be a PRP at the Site as a[n] owner of part of the Site property." GNL at 2.

Although the SLC holds title to a portion of the Site, it argues that "neither the Commission nor the people of the State of California, on whose behalf the Commission acts, have ever owned any property within the boundary of the Site for purposes of CERCLA liability." The SLC claims that to be an "owner" under CERLCA, an entity must be an owner as defined by common law.

For at least four reasons, the SLC should not be removed as a PRP at the Site. First, as the SLC freely admits, it owns part of the Site, and as such, it is a necessary party because portions of its property will need to accessed and remediated during the cleanup of the Site. Indeed, the portion of the Site that the SLC states that it currently owns and leases to State Parks lies along the northern boundary of the slough near the mouth, a portion of the Site that EPA's

Draft EE/CA recognizes as a portion that may require active remediation. It also may be a primary point of access to the other portions of the Site requiring remediation.

Second, it would be premature to remove the SLC as a PRP at this juncture. Out of the dozens of PRPs named by EPA at this Site, there is no reason to allow one owner PRP to be separately considered and removed as a PRP. There are many other PRPs – including in particular many alleged arrangers – that also appear to have strong arguments for removal as PRPs. Unless EPA is willing to expend the resources to consider separately arguments from each and every PRP that may have liability arguments at the Site, the SLC should remain a PRP and have its liability determined during the normal course just like all the others.

Finally, the SLC's legal arguments that it is not an owner are far from compelling. Its status as a PRP at Yosemite Slough can be readily distinguished from the two Ninth Circuit cases cited by the SLC. Both of those cases analyzed only whether holders of certain entities that possessed lesser property interests should be considered "owners" under CERCLA. Specifically, in *Long Beach Unified School Dist. v. Dorothy B. Goodwin California Living Trust*, 32 F.3d 1364, 1368 (9th Cir 1994), the Ninth Circuit analyzed whether easement holders should be considered "owners" under CERCLA, and in *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440 (9th Cir 2011), the Ninth Circuit considered whether holders of revocable permits should be considered owners under CERCLA. The SLC's ownership status is very different. According to the SLC, it "currently holds and historically has only ever held title to land which the State of California assumed from the federal government when it became a state in 1850." SLC Letter at 2. Critically, lands granted to states by Congress convey fee simple title, *see* 43 U.S.C. § 859, not the lesser property interests at issue in the two cases upon which the SLC relies.

Moreover, the single judicial decision cited by the SLC that actually addresses whether holding title to state sovereign land constitutes "ownership" under CERCLA is an *unpublished* decision: *United States v. Montrose Chemical Corp*., CV 90-3122 AAH (C.D. Cal. Oct. 19, 1999). Even if the *Montrose* decision were binding authority, which it is not, the facts of this case have not been developed and briefed sufficiently for a court, much less an administrative agency at an early stage of the proceedings, to make a final determination that the rationale of the unpublished *Montrose* decision should be applied here. It was just a few months ago that EPA clarified the actual ownership of the different portions of the Site, including the transfer of a portion of it from the SLC to the City of San Francisco. Based on our limited research at this early stage[1], it appears that the SLC's title may include several critical elements of common law ownership that would distinguish it from the facts of the *Montrose* case. For example, the SLC was able to sell the property in the slough to the City pursuant to the Burton Act, 1968 Cal. Stat. Ch. 1333. (A complete copy of the Burton Act can be downloaded at

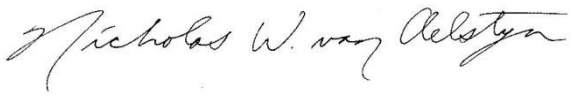
[1] For example, we have not seen the 1983 quitclaim deed reference in the Declaration of Steven Lehman that was submitted along with the SLC letter. While his Declaration included exhibits that reflected his analysis of this deed and other records, the records themselves were not included. Other experts may interpret those records differently.

http://www.sfport.com/ftp/uploadedfiles/about_us/divisions/planning_development/projects/Burton%20Act.pdf; a hard copy is enclosed for your convenience as well.) The State received compensation from the City for this transfer, including a payment equal to the amounts due on the bonded indebtedness incurred for San Francisco Harbor improvements and also indemnification by the City with regard to all outstanding bonded indebtedness. *See* Burton Act at Section 9.

This last point demonstrates one further reason that SLC's request should be denied: it is the former owner of the entire Site. Indeed, SLC owned the entirety of the slough prior to 1968 when much of the contamination likely occurred.

In conclusion, EPA should reject the SLC's request to be removed as a PRP. As the current owner of a key portion of the Site that EPA has stated may require active remediation and which likely also will provide access to the rest of the Site, the SLC is a necessary party. It also owned the entire Site when much of the contamination likely occurred. In addition, it would be premature and improper for EPA to provide early consideration to the liability arguments of a single owner PRP that also happens to be a sister governmental entity while at the same time refusing to consider the equally strong liability arguments of dozens of other PRPs with far more attenuated connections to the Site. Lastly, even if EPA were to provide such special consideration to the SLC's arguments, there are, in addition to these legitimate legal and policy concerns, significant factual questions about whether the SLC has met even the standard for which it advocates. For all the foregoing reasons, we respectfully suggest that EPA deny the SLC's request to be dropped as a PRP.

Sincerely,



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Enclosure